INTERIOR BOARD OF INDIAN APPEALS

Black Hawk Oil Co. v. Acting Anadarko Area Director, Bureau of Indian Affairs

18 IBIA 414 (09/13/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

BLACK HAWK OIL CO.
v.
ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-97-A Decided September 13, 1990

Appeal from a decision not to approve a proposed oil and gas communitization agreement.

Affirmed.

1. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Communitization Agreements

   A guideline of the Bureau of Indian Affairs, published in the Federal Register, which states that "lessees of Indian lands are encouraged to submit all future communitization agreements * * * not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit," does not require that all communitization agreements must be submitted at least 90 days prior to the expiration of the Indian lease in order to be considered or to prevent expiration of the lease.

2. Indians: Mineral Resources: Oil and Gas: Communitization Agreements

   The Bureau of Indian Affairs properly declines to approve a proposed communitization agreement when that agreement is first filed in approvable form after the expiration of the underlying Indian lease.

APPEARANCES: Timothy J. Lamiell, Esq., Oklahoma City, Oklahoma, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Black Hawk Oil Company seeks review of an April 18, 1988, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (BIA; Area Director), declining to approve a proposed oil and gas communitization agreement (CA). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Lease No. 14-20-205-8229 (Lease 8229) was entered into on July 2, 1980, between the successors of Old Crow, Jr., deceased, a Cheyenne-Arapaho Indian, and Woods Petroleum Company (Woods). The lease covered lot 5 and the NW¼ SE¼, and S½ SE¼, sec. 5, T. 15 N., R. 14 W., Indian Meridian, Custer County, Oklahoma, containing 157.20 acres, more or less. The lease was approved by the Concho Agency Superintendent, BIA (Superintendent), on February 5, 1981, and had a term of 5 years "and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." Thus the primary term of the lease ended on February 5, 1986.

Due to the movement of the North Canadian River, approximately 52.41 acres which are attributable to the lands described in Lease 8229 are presently located in sec. 4, T. 15 N., R. 14 W. Appellant states that Woods paid additional bonus and delay rental consideration for this and other accretion acreage.

Appellant states at pages 2-3 of its Statement of Appeal:

> All of Section 4 has been established as a single drilling and spacing unit for the Morrow Common Source of Supply by Oklahoma Corporation Commission Order No. 49243 dated July 6, 1962 and for the Springer, Cherokee Sand, Chester, Tonkawa, Cottage Grove, Cleveland, Oswego and Atoka Common Sources of Supply by Oklahoma Commission Order No. 175577 dated September 8, 1980.
>
> * * * Woods is and was the record owner of the Lease. However, by Oklahoma Corporation Commission order No. 225868, entered October 12, 1982, L.G. Williams Oil Company force pooled the interest of Woods in the Lease insofar as it lies within Section 4 as to the Cherokee Sand, Morrow, Chester, Springer, Tonkawa, Cottage Grove, Cleveland, Oswego and Atoka Common Sources of Supply. Pursuant to the terms of the Order, Woods elected an overriding royalty interest, to be converted to a 25% working interest at payout of the well. O.I.L. Energy, Inc. (O.I.L.) was designated operator of the unit. O.I.L. commenced drilling of the Baldwin No. 1-4 well in the NW/4 NW/4 SE/4 of Section 4 on October 12, 1982, drilled to a total depth of 10,763 feet and completed the well as capable of commercial production of oil and gas from the Morrow Common Source of Supply on April 26, 1983, * * *. By Assignment effective April 1, 1984, Black Hawk acquired the rights of O.I.L. in the unit, including O.I.L.'s force pooling rights in the Lease. A pipeline connection was made to the well on September 30, 1985, * * *.

On October 28, 1985, appellant submitted an unexecuted draft CA to the Tulsa Office of the Bureau of Land Management (BLM). The CA involved Lease 8229 as well as Federal lease OK NM 43768. Appellant requested that BLM review the CA to see if it was approvable. BLM stated that it orally

advised appellant on November 1, 1985, that the CA appeared to be in executable form, although there appeared to be a discrepancy in the acreage listed for Lease 8229. BLM indicated that the CA would be reviewed in more detail when it was fully executed. 1/

On January 28, 1986, BLM received the executed CA from appellant. Although appellant had apparently been advised of all necessary items and requirements, several items were not submitted. The omitted items were requested and were received by BLM on February 18, 1986. By memorandum of February 21, 1986, BLM forwarded the CA to the Superintendent, stating at page 2: "it is our opinion that these approvals should be granted, since the agreement includes the participation and affords adequate protection to both the restricted Indian and Federal interests involved. Accordingly, we recommend approval by your office to commit the restricted Indian lease."

On July 21, 1986, the Superintendent asked the undivided interest owners in lease 8229 if they objected to the Proposed CA. The Superintendent explained:

> If the C.A. is not approved, the lease will be considered to have expired on February 5, 1986, in which case the [$1,613.98 in accumulated] royalties could not be paid out until the allotment was leased again and communitized. If a new lease is obtained, you would benefit from the receipt of a new lease bonus payment as well as the royalties from production. However, there is also the possibility that the allotment would not receive any bids for a new lease and go unleased for an indefinite period of time. At this time, it is very difficult to predict the amount of bonus bid offer the allotment would receive or if it would receive any at all.
>
> We believe that with the current oil and gas market conditions and the lack of new activity in the area, approval of the C.A. would be in your best economic interest. If the C.A. is not approved, there is no guarantee that the allotment could be leased again very soon. Approval would allow you to benefit from royalties right away.

Based on the responses received from the undivided interest owners, the Superintendent wrote appellant on February 17, 1987, stating:

> Due to the fact that the said agreement was not received or approved prior to the expiration date of the restricted Indian Oil and Gas Lease No. 14-20-205-8229, we were compelled to obtain the acceptance of this agreement from the Indian mineral owners prior to the granting of approval as there has been appeal precedent established in such cases.

1/ See Mar. 24, 1988, letter from BLM to appellant. BLM indicated that because of a heavy workload and short staffing it was not able to review draft documents in great detail.

> Subsequently, there was some objections by the owners in that the agreement would serve to hold the entire lease indefinitely, without the offer of any new and/or additional consideration. However, we believe that if the 171.20 acres in Section 5 were relinquished, our position to grant approval would be strengthened, as the Indian owners could then receive royalty revenue from the small producing portion of the lease without tying up the larger, non-participating portion, leaving it open for possible future development.
>
> The records show that Woods Petroleum Corporation paid an additional bonus and back rental for 64.88 acres of accretions on June 24, 1981. The 64.88 included 50.88 acres * * * which your survey has apparently increased to 52.41 acres. Retroactive bonus and back rental paid on the additional 1.53 acres with the assumption that the original lease does contain all of the accreted acreage or an aggregate total of 223.61, more or less, could further improve our position in approving the agreement.
>
> The proposed action would keep the current lease in effect, complete the unit, release non-participating acreage and provide revenue sharing to the Indian landowner as well. We believe this arrangement to be beneficial to all involved and in the best interest of the Indian mineral owners. Therefore, we hope that you will afford this proposal your utmost consideration.

On June 3, 1987, the Superintendent again wrote appellant, noting that he had not received a response to his February 17, 1987, letter, and requesting a response.

On February 26, 1988, appellant wrote several Departmental officials, including the Area Director, stating that it and Woods had done everything possible to develop the lease. Appellant charged that any delays in submission of the CA were the responsibility of BLM. Appellant further stated its belief that the lease continued in effect.

BLM wrote appellant on March 24, 1988, objecting to the allegation that it was responsible for a delay in considering the CA. The letter noted that BLM processed the CA even though it was not timely received under BIA directions; BLM only recommends whether or not a proposed CA should be approved, while BIA has the final approval authority for restricted Indian leases; and Federal lease OK NM 43768 was considered to be in full force and effect as being held by production. BLM further informed appellant of ways the CA could be dealt with in the absence of the Indian interests.

The Area Director responded to appellant on April 18, 1988, stating at pages 1-2:

> The five-year lease (8229) expired February 5, 1986, which was 19 days prior to receipt by the Concho Agency of Black Hawk's

CA for Section 4. The CA included approximately 52.41 acres in Section 4 of accreted acreage attaching to Lot 5, Section 5.

Because of the lapse of the primary term of the lease and the fact that joinder in the CA of that leasehold would also commit all of the acreage in Section 5, ownership participation was deemed necessary in the decision making process. One of the owners thereupon submitted written objection to communitization. These factors were considered by Concho Agency staff in the review of the CA and it is our opinion that they acted properly in determining that they lacked authority to commit Lease 8229, whose primary term had elapsed.

We received a copy of Bureau of Land Management's March 24 response directed to your office. The directive therein referred to provided that CA's are to be submitted 90 days prior to Bureau lease expiration, which would permit adequate time for corrections, modifications and/or otherwise sufficient opportunity to obtain if necessary, data having an impact on evaluation. This procedure should be beneficial to both the applicant and reviewing Agency(s). Because of the continuance of industry to submit CA's for approval within days and/or hours of lease expiration, during the early 1980's, the Deputy Assistant Secretary was prompted to issue BIA guidelines addressing among other things, untimely submissions. Most of our lessees received a copy, and many also attended a special meeting in Oklahoma City, May 19, 1982, for the specific purpose of talking about the new guidelines. The April 23, 1982 directive included the finding that a Federal Register Publication should issue immediately, reflecting that future CA's should be submitted not later than 90 days prior to expiration of the first Indian lease within the proposed unit. That was accomplished by Publication June 22, 1982, at Vol. 47, No. 120, F.R. 26920. * * *

In view of the above, it is my decision that the CA as submitted was not then nor is it now in approvable form. I am further making the recommendation to the Concho Agency Superintendent that he advertise at the next lease sale, as separate parcels, the acreage in Section 5, and any right, title and interest in and to the accreted acreage extending therefrom into Section 4.

Appellant filed a notice of appeal dated May 17, 1988, and a statement on appeal dated June 14, 1988. This appeal was still pending before the Washington, D.C., BIA office on March 13, 1989, the date new appeal regulations for BIA and the Board took effect. The appeal was transferred to the Board for consideration under the new procedures on September 22, 1989. No additional briefs were filed with the Board.

Discussion and Conclusions

Appellant argues that: (1) the Area Director's decision not to approve the CA is grossly unfair to appellant and is, therefore, arbitrary, capricious, and an abuse of discretion; (2) the "requirement" that CA's be submitted not less than 90 days prior to the expiration of the primary term of the lease is not mandatory and should not be applied here; (3) the Area Director's decision contravenes BIA policy regarding deference to recommendations of the Minerals Management Service (MMS) in the approval of CA's; 2/ and (4) the Area Director did not show that he considered the economic interests of the Indian royalty owners, as is required under Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982), when he refused to approve the CA.

The Area Director's decision discusses guidelines published at 47 FR 26920 (June 22, 1982). This publication states:

> SUMMARY. On April 23, 1982, the Deputy Assistant Secretary - Indian Affairs (Operations) transmitted to all Area Directors new guidelines to assist them in exercising their authority to approve communitization agreements affecting Indian oil and gas leases. The guidelines are based upon a judicial determination of the scope of that authority in a recent decision of the U.S. Court of Appeals for the 10th Circuit. The purpose of this notice is to inform lessees and operators about the guidelines adopted, with particular emphasis on the need in the future to submit communitization agreements to the appropriate Bureau office not less than 90 days prior to the date of expiration of the first Indian lease within the proposed unit.
>
> * * * * * *
>
> SUPPLEMENTARY INFORMATION. It is the intent of the BIA that in exercising the Secretary's discretionary authority to approve or disapprove communitization or unit agreements, BIA officials should take into consideration the Indian owners' best interests and consider all of the factors, including economic considerations, as prescribed by the U.S. Court of Appeals in its decision in Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (February 17, 1982). * * * Accordingly, the new guidelines require that in the future BIA Area Directors and Superintendents must prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement is in the best interests of the Indian lessor. * * *

2/ The types of responsibilities concerning onshore leases that are involved in this appeal were formerly carried out by MMS, but were transferred to BLM in 1983. Secretarial Order No. 3087, as amnded, 48 FR 8982, 8983 (Mar. 2, 1983).

> The Bureau is aware that the process of reaching the determinations required by the guidelines will require that Area Directors and Superintendents receive proposed agreements sufficiently in advance of the expiration of the primary term of any Indian lease within the proposed unit in order to conduct an adequate review of the engineering and economic factors involved.
>
> Consequently, in order to ensure adequate consideration, lessees of Indian lands are encouraged to submit all future communitization agreements to the appropriate Bureau of Indian Affairs office not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit.

[1] The operative words in this publication are "are encouraged to submit." This language does not rise to the level of a requirement that CA's must be submitted 90 days prior to the expiration of the first Indian lease in order to be considered or to prevent expiration of the lease. The publication requests cooperation from the leasing public so that proposed CA's may be given the consideration required by the court's holding in Kenai, supra. To the extent the Area Director's decision may have suggested that the proposed CA was not timely submitted because it was received less than 90 days before the expiration of Lease 8229, it was in error. Under the facts of this case, however, the error is harmless.

[2] The record shows that appellant presented the CA to BLM on January 28, 1986, approximately one week before the expiration of Lease 8229. 3/ However, in its March 24, 1988, letter, BLM states that the proposed CA was not in approvable form when it was initially presented. BLM states that one exhibit was incorrect, and Oklahoma Corporation Commission Completion Report Form 1002-A and the State Spacing Order were not submitted. 4/ The record shows that the additional materials were submitted by letter dated February 13, 1986, which BLM states it received on February 18, 1986. Thus, assuming arguendo, that the date the application was filed with BLM should be the controlling date, 5/ the CA was not filed in approvable form until February 18, 1986, well after Lease 8229 expired on February 5,

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3/ The record does not show why the proposed CA was presented only to BLM, rather than to BIA or to both BIA and BLM. The Board notes that the proposed CA also included Federal Lease OK NM 43768, and that BLM acts as a technical advisor for BIA on matters concerning restricted Indian oil and gas leases. BIA has not contended that filing of the proposed CA with BLM was incorrect, only that it resulted in the proposal's reaching BIA after the expiration of the primary term of the lease.

4/ Most of the documents generated by BLM are not part of the record in this case, although appellant's responses to BLM's requests are. Presumably this is because documents generated by BLM are considered BLM records rather than BIA records. The failure to have these documents in the record in this case constitutes harmless error because appellant's responses speak for themselves. BIA is advised, however, that it should obtain copies of relevant BLM records when they underlie its decision.

5/ This assumption is the one that is most favorable to appellant.

1986. The Board has previously held that an Indian oil and gas lease expires by its own terms when there is no production during the primary term and the lease is not included within a producing unit under a CA approved prior to the expiration of the lease. See Continental Oil Co., 2 IBIA 116, 80 I.D. 786 (1973), and cases cited therein. Accordingly, under the facts of this case, there was no extant lease for the Area Director to approve for inclusion in the proposed CA.

Oil and gas leases involving Federal and Indian lands are not governed by the same laws and regulations. See Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 97 I.D. 215 (1990). See also Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353 (1987), aff'd, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990) (involving rights-of-way over Indian as opposed to Federal lands). Although the history of regulatory provisions regarding the submission of applications for approval of CA's including Federal leases is, therefore, not dispositive of the present case, it is at least instructive.

In 1981, 43 CFR 3105.2-3 provided that a CA was "effective only after approval by the Secretary of the Interior." This regulation was amended by notice published at 48 FR 33648, 33670 (July 22, 1983), to allow the submission of a CA after the expiration of the Federal lease or leases. The revised regulation was explained by the Interior Board of Land Appeals in Bruce Anderson, 80 IBLA 286, 296 (1984):

> Effectively, this regulation has amended past practice so that it is now possible to retroactively approve a communitization agreement to a date prior to the expiration of a Federal lease, even where the agreement is not filed with the Department until after the expiration date of the lease so long as the communitization agreement is actually executed prior to lease issuance [and the Federal lands have not been subsequently leased to a different party].

The regulation was again amended at 53 FR 17340 (May 16, 1988). The preamble to the final rules states at 53 FR 17345:

> Two comments questioned allowing the filing and approval of a communitization agreement after the lease expires. * * * One comment expressed the view that approval of an agreement after the lease expires has the effect of breathing life back into a lease so long as the lands have not been posted on a list of lands available for leasing. The comment further suggested that this form of a lease extension is not authorized by the Mineral Leasing Act, and that in most instances an action to communitize lands is required prior to the expiration date of any involved lease. * * * The final rulemaking removes paragraph[] (b) * * * of the proposed rulemaking relating to * * * filing of agreements for consideration after the lease expiration date.

43 CFR 3105.2-3(a) now provides: "The agreement shall be signed by or on behalf of all necessary parties and shall be filed prior to the expiration

of the Federal lease(s) involved in order to confer the benefits of the agreement upon such lease(s)."

It thus appears that, although for a short time CA' s including a Federal lease could be filed after the expiration of the Federal lease, that practice was abandoned and CA's including such leases must again be filed prior to lease expiration. 6/

In regard to appellant's remaining arguments, because the Area Director's decision was properly based upon the legal determination that Lease 8229 had expired before the proposed CA was filed in approvable form, his decision not to approve the CA was not arbitrary, capricious, or an abuse of discretion. Furthermore, any BIA "policy" regarding deference to recommendations of MMS cannot override the legal expiration of a lease by its own terms. The record also shows that BIA did consider the economic interests of the Indian royalty owners.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 18, 1988, decision of the Acting Anadarko Area Director is affirmed. 7/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

6/ The Board notes that the CA at issue in this case was filed with BLM during the time when CA's involving Federal leases could be approved retroactively under 43 CFR 3105.2-3 (1984) to revive an expired Federal lease. It is not apparent from the record whether, in making its recommendation, BLM was cognizant of the differences between Federal and Indian leases concerning approval of CA's involving expired leases.

7/ The Indian owners of the mineral interests included in Lease 8229 have not been served with any of the pleadings in this case. When this case began, these individuals were probably not considered interested parties. Under the Board's rules, however, they are. The Board issues this decision in order to prevent further, perhaps unnecessary, delay in the proceeding. However, the Area Director is instructed to forward a copy of this decision to each Indian mineral interest owner and to provide the Board with proof of such service, including the date of receipt by each owner. The Board's regulations provide at 43 CFR 4.315(a): "Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted."